84-575

No. ____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1984

Oak Beach Inn Corp.
and
Robert W. Matherson,
Petitioners,

against

Babylon Beacon, Inc., d/b/a
Babylon Beacon Newspaper,
Edward D. Wolfe and Jane D. Wolfe
and
John and/or Jane Doe(s)
being and intending to be the writer(s)
of a "Letter to the Editor" in the
April 9th edition of the Babylon Beacon,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Rebore and Thorpe, P.C.
By Bartholomew J. Rebore
Attorneys for Respondents
150 E. Sunrise Highway
Lindenhurst, NY 11757
(516) 226-3200
(718) 464-9257

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STATEMENT OF CASE

This case involves an interpretation of New York Civil Rights Law §79(h) (the Shield Law) and of New York Civil Practice Laws and Rules (CPLR 3102(c), 3120, 3126).

The issues were raised when petitioners sought to compel respondents to disclose the identity of an anonymous writer to their "Letters to the Editor" column so that petitioners could sue the writer for libel. The New York State Court of Appeals ruled that under New York State's Shield Law, respondents could not be required to disclose the identity of the anonymous source (CPLR 3102(c)).

Petitioners also argued, belatedly, as pointed out by the Court of Appeals, that they also needed to know the identity of the letter writer to prove actual malice on the part of respondents. The Court of Appeals held that striking respondents' answer and exposing them to a default judgment for failing to disclose its source was too severe a sanction under

CPLR 3126 and ruled that the lower court should have limited its order to requiring respondents to defend the allegation of malice by relying on proof of its own independent investigation, without placing any reliance on its source.

When petitioners originally moved for an order compelling respondents to disclose the identity of its source, respondents cross-moved for an order of summary judgment dismissing the action. A decision on respondent's cross-motion for summary judgment has been held in abeyance pending a final determination of the validity of the lower court's order striking respondents' answer. Now that that order has been reversed, the lower court must address respondents' request for summary judgment dismissing the action.

Furthermore, a motion for summary judgment automatically stays all discovery under New York State procedure (CPLR 3214(b)) and no discovery in this action has been held. The case is in fact, only at the pleading stage.

SUMMARY OF ARGUMENT

This case presents an interpretation of New York State's Shield Law and its discovery statutes. It does not present any of the considerations normally required for review under Rule 17.

Petitioner's arguments of equal protection and due process were never raised in the Court below and the questions should not be reviewed, Lawn v. United States, 355 US 339, 362-363 n. 16(1958).

New York State's Shield Law does not violate petitioner's equal protection and due process rights, Syd Fischer, et al, v. Andrew Mc Gowan, et al, 479 FS 522(DC RI 1984).

The record is not ripe for a determination of the issues raised.

1. There Are No Special And Important Issues Warranting Review.

The decision of the New York State Court of Appeals is limited to an interpretation of New York's Shield Law (Civil Rights Law 79(h)) and its discovery statutes (CPLR 3102(c), 3120, 3126). These are matters of state law and have no application beyond the boundaries of the state.

2. The Questions Raised On This Petition Were Not Raised In The Court Below.

Petitioners' arguments of equal protection and due process were never raised by petitioners' in the New York State Courts and those Courts did not consider any such questions. Not having been raised in the Courts below, and there being no special circumstances, the questions of equal protection and due process should not be reviewed by this Court, Lawn v. United States, 355 US 339, 362-363 n.16 (1958).

3. New York State's Shield Law Does Not Violate Petitioners' Equal Protection and Due Process Rights.

New York adopted a Shield Law 14 years ago.

In approving the legislation, New York Governor Rockefeller stated:

> "The bill protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information or sources of information obtained in the course of gathering news for publication.
> ***
> Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.
> The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." (NY Legis Ann, 1970, p 508)

An action for defamation is a state created cause of action and solely a matter of state law, Gertz v. Welch, Inc. 418 US at 342. The State of New York has clearly stated that the gathering and protection of the source of news is of greater importance to the public interest than a defamation action plaintiffs need to gather information of actual malice. The legislature's decision to favor the public interest in access to information over an in-

dividual's common law right to vindicate reputation does not violate any constitutionally protected right. Paul v. Davis, 424 US 693, (1976); Louis Mazzella, et al v. Philadelphia Newspapers, Inc. et al, 479 FS 522 DCED NY (1979); Fischer v. McGowan, supra; Ex Parte Sparrow, 14 FRD 351 DC ND ALA, (1953); also see Charles Baker et al v. F & F Investment et al, 470 F2d 778, 2nd Cir., (1972)(Civil rts. case. Blockbusting. Balance of interest favors non-disclosure); Franklin Life Ins. Co. v. William J. Champion Co., 350 F2d 115, 6 Cir, (1965) (Physician-patient privilege does not violate due process and equal protection).

Furthermore, as this court noted in Branzburg v. Hayes, 408 US 665, at 706,

> " . . . At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their

> own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."

4. The Record Is Not Adequate For A Consideration of The Issues Petitioner Seeks To Review.

Petitioners argue that the decision of the New York State Court of Appeals which protects the right of respondents' not to disclose the source of a letter to its editor will make it impossible for respondents to meet the actual malice test. There is, however, nothing in the record to support this contention.

This case is only at the pleading stage. No discovery has been held and a motion by respondents to dismiss the action is pending. Plaintiffs have not established that the publication was libelous, or if libelous, that it was false. Furthermore, in the absence of any record as here, petitioners have no basis upon which to argue that the information is

not available from some other source or even that the information is in fact, necessary to establish actual malice on the part of the respondents.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Rebore and Thorpe, P.C.
Attorneys for Respondents
150 East Sunrise Highway
Lindenhurst, NY 11757
(516) 226-3200
(718) 464-9257